4 61 & 4 54.

Filed MAY 29 1899

JAMES H. McKENNEY, Clerk

Brief of DuVal for Appellees

In the Supreme Court of the United States.

Filed May 29, 1899.

JOHNSON ET ALS.,
Appellants.

vs.

No. 461

NATION,
Appellee.

MORGAN ET AL.,
Appellants,

vs.

No. 454.

STATES,
Appellee.

Briefs in Behalf of the Appellees.

BEN T. DUVAL,
Attorney for the Muskogee Nation.

TRIBUNE PRINT, FORT SMITH, ARK.

In the Supreme Court of the United States.

JENNIE JOHNSON ET ALS.,
Appellants.

vs.

No. 461

CREEK NATION,
Appellee.

Brief in Behalf of the Appellee.

This is an appeal from the judgment of the United States Court of the Northern District of the Indian Territory, rendered June 16, 1898, affirming the judgment and decision of the Dawes Commission denying the admission and enrollment of the appellants as citizens of the

Creek Nation. The appeal is taken under the provisions of the Act of Congress, approved July 1st, 1898.

Statutes 2d Session, 55th Congress, page 591, which reads as follows: "Appeals shall be allowed from the United States Courts in the Indian Territory direct to the Supreme Court of the United States to either party, in citizenship cases, and in all cases between either of the Five Civilized Tribes of the United States involving the constitutionality or validity of any legislation affecting citizenship or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in 120 days from its passage; and in cases decided subsequent thereto, within 60 days from the final judgment. * * "

The question which meets us upon the threshold, is as to the power of Congress to grant the right of an appeal in the cases decided before the passage of the act which was approved July 1st, 1898, four days after the rendition of the judgments in these cases.

The law under which the Dawes Commission passed upon citizenship cases was approved June 10th, 1896, and after prescribing the procedure before the Commission the following provisions were incorporated therein: "*Provided*, That if the tribe, or any person be aggrieved by the decision of the tribal authorities, or the Commis-

sion provided for in this act, it or he may appeal from said decision to the United States District Court: *Provided*, However, That the appeal shall be taken within 60 days, and the judgment of the court shall be final."

The appellants appealed from the decision of the Dawes Commission rejecting their application, and refusing to enroll them as citizens of the Creek Nation, to the Court below, and after a long and tedious examination of witnesses before the Special Masters, the Court in an exhaustive opinion, after commenting upon the testimony and citing the laws of the Creek Nation in reference to citizenship therein, entered a judgment against their right. This decision was rendered as before stated on the 16th day of June, 1898, and according to the law as then existing, that judgment was final. (Tr. pp. 29-43.)

Could Congress divest the Creek Nation of the right secured by that judgment by subsequently granting an appeal to this court?

Rights secured by judgment cannot be divested.

Wade on Retroactive Laws, Sec. 172, page 73.

Atkinson vs. Dunlap, 50 Me. 111.

It is universally held that rights secured by a judgment are vested rights, and are protected by the following provisions of the Fourteenth Amendment of the constitution: "No state shall make or enforce any law which shall prejudice the privileges or immunities of any citizen

of the United States, or deprive any person of life, liberty or property without due process of law."

This protection not only applies to state legislation, but also to the legislation of Congress.

Hill vs. Sunderland, 3 Vt. 570.

Black on Constitutional Prohibitions. Sec. 197.

The legislature has no constitutional power to grant an appeal or writ of error where no such rights existed when judgment was pronounced. A statute authorizing the opening of judgments rendered before its passage impairs vested rights and infringes upon the judicial Department.

Black on Const. Prohibition, Sec. 198, 199.

Merrill vs. Sherburne, 8 Amer. Dec. 52.

Burt vs. Williams, 24 Ark. 91.

1st Freeman on Judgments, Sec. 90.

Smith Stat. and Con. Law, Sec. 340.

If the power of Congress to grant appeals is conceded, the jurisdiction of this court is limited in these cases to the trial and determining the constitutionality or validity of the legislation of Congress affecting citizenship in the Creek Nation. It is not to the interest of the appellees to establish the constitutionality or validity of such legislation.

If this court should hold that such legislation is unconstitutional, the cases would be dismissed for want of jurisdiction, and the appellants remitted to the condition that

they occupied when this litigation began, that is, non-citizens of the Creek Nation with no tribunal to adjudge them otherwise, and no authority to create one. The constitutionality or validity of this legislation is not brought before this court by the assignment of errors. There are eighteen assignments of error and all of them amount substantially to the assertion that the court erred in not adjudging that the appellants were entitled to be enrolled as citizens of the Creek tribe.

The court below, in its opinion cites the various acts of the Creek Council upon the subject of citizenship, and correctly finds that the National Council of the Muskogee Nation is the only authority which could admit persons whose citizenship was questioned. Commencing with the first authentic act which is found on page 63 of Perrymans Digest down to the Act of May 30, 1895, creating the Citizenship Commission the written law required decisions or findings of the court to be reported to the Council for its approval.

The testimony of the witnesses shows that where enrollment of parties whose right to citizenship was doubtful were made by Town Kings, the validity of such enrollment was to be determined by the Council.

See the testimony of N. B. Childers, page 66 Tr.

Jo. Mingo, page 68 Tr.

Moses Smith, page 73 Tr.

We assert that in no case does the testimony show that any other authority than the Council of the Muskogee Nation had a right to enroll parties whose citizenship was questioned, without submitting the same to the Council. The Act of Oct. 26, 1889, known as the "Alien Act," the court found to be the proper exercise of the inherent power of the Creek Nation to declare who were the legal citizens thereof. The appellants in this case complain that they were unjustly and unlawfully stricken from the rolls by the Citizenship Committee of Eighteen, created by Act approved May 15, 1895, and the Act of May 17, 1895. The preamble of these two Acts show the reason for creating that Committee. It was not for the purpose of trying and determining who were citizens, but simply for the purpose of striking from the rolls persons who had been placed thereon by fraudulent methods.

This Committee reported to the Council the rolls as corrected by it and the names of persons, numbering 618, who had been stricken from the rolls, and whose right to citizenship was in doubt.

The preamble to the Act of May 30, 1895, creating the Citizenship Commission, discloses the intention of the Council, and that it was a gracious measure enabling those who had been stricken from the rolls by the Eighteen Committee and were put on the doubtful list to establish their right to citizenship.

The roll made by the Eighteen Committee was reported to the Council and approved and adopted, and the roll was taken as a basis for the representation in the National Council.

The Dawes Commission and the Court below have passed upon the testimony presented and have found that it was insufficient to establish that the applicants were entitled on account of blood and residence to be enrolled as citizens of the Creek Nation. Part of them were excluded by the "Alien Act," of October 26, 1889. They were born outside the limits of the Creek Nation, and had remained absent for the period of 21 years without making an application, in good faith, to be admitted to citizenship. The court found that the District Court had no authority to admit persons to citizenship. It also found that the mere enrollment of a non-citizen by the town King, did not entitle the parties to the rights of citizens. These findings are assigned as errors for which the appellants ask for reversal.

The prevailing opinion when this question of citizenship was first agitated was, that blood was the only test; that if an applicant for citizenship could show that the smallest quantity of Creek blood flowed in his veins, he was entitled to all the rights and privileges of a citizen of the Creek Nation. A subsequent examination of the laws relating to citizenship generally, and especially in the

Creek Nation, showed this to be erroneous.

The Creek Nation contends and the Court held, in order to entitle one to recognition as a citizen of said Nation, entitled to the full benefits thereof, it required both blood and residence.

See Tr. page 29-43 opinion of the Court.

The time allowed by the Court for filing briefs is so short that the attorney for the appellee is unable to go elaborately in the presentation of authorities, and acts of the Council upon citizenship. The question of the jurisdiction of this court under the acts of Congress has been fully and exhaustively presented by the attorney for the Cherokee Nation, and upon that point, the position of the two Nations is identical.

If this court should find that the legislation of Congress was unconstitutional, and invalid all the appealed cases would be dismissed; and if the court should find that Congress had the right to grant appeals in cases which had been decided by the court, which under the law was to be final, prior to the passage of the Act of Congress granting the appeal, then the question arises whether the jurisdiction of this court was restricted to the trial, and determination of the validity and constitutionality of the Acts of Congress affecting citizenship in the Creek Nation.

The contention of the appellants is that they are Creek

Indians by blood; that they had been enrolled as citizens of the Creek Nation, and were unjustly stricken from the rolls by the Citizenship Committee of 18 created by Act of the Creek Council approved May 15, 1895. Counsel for the appellants did not see fit to quote the language of the Act of May 15, which is as follows: "That a special Committee to be composed of 6 members of the House of Kings and 12 members of the House of Warriors be appointed to take charge of the census rolls of the various towns and carefully examine the same, and ascertain whether or not they are correct; and if any of them be found to contain the names of non-citizens, such names shall be expunged from the rolls, and reported separately to the National Council, and the acts of the special Committee shall be subject to the approval of the National Council."

The preamble to the supplemental Act approved May 17, 1895, declares that "It had become notorious that by questionable and unjust methods and practices many non-citizens had been counted as citizens and participated in the per capita distribution of public funds."

The Committee of 18 were instructed to entertain, and consider any and all challenges and questions urged in good faith by any respectable citizen against the claim of any person to citizenship in the Nation, and strike from rolls and preserve a correct list of all the names so strick-

en out to the present session of the Council.

See Pamphlet Acts of the Creek National Council of the sessions of May, June and December, 1895, pages 1 and 2.

The counsel for the appellants quotes the report of the Committee of 18 to the Council in conformity with the above cited Acts, which was adopted June 8, 1895.

See pages 12 and 13, of the Acts above cited.

The counsel for the appellants on page 38 of his brief uses the following language: "This report of the Committee was followed by no act, or resolution introduced either in the House of Kings or the House of Warriors, or passed by either House or approved by the Chief." He further asserts on the same page, "There was no legislative sanction, or approval given to the report of the Committee by either the House of Kings or the House of Warriors, as required by the first Article of their Constitution." He concludes as follows: "So we maintain there is not, and never was any legislative validity in this procedure, even if the power had existed in the Council to give it the effect claimed, and so we say there is no valid action taken by any lawful authority of the Creek Nation to remove the names of the appellants from the authenticated rolls of the Creek Nation as they existed in 1895, but the rolls continued in legal effect as they existed until the passage of the Act of Congress of June 10, 1896, and

that Act confirms the roll as it then legally existed, with the names of these appellants upon it." These assertions show the ignorance of counsel of the laws of the Creek Nation, and the haste in which he prepared his brief. On the same page of the Session Acts where he found the report of the Committee which he quotes, and immediately following it is the following: "Be it enacted by the National Council of the Muskogee Nation in extraordinary session assembled: That each town of the Muskogee Nation is hereby required and instructed to base its next general election in September, 1895, for members of the National Council upon the number of citizens as shown by the census reported by the Committee of 18 to the Council on June 8, 1895." (Here follows the names of the towns, the number of citizens, and the representation in the House of Kings and in the House of Warriors). And concludes, "Until some future emergency shall necessitate a different apportionment. Approved June 8th, 1895, pages 13 and 14 of the Session Acts, above cited."

This was a most emphatic approval of the report and an adoption of the rolls made by the Committee.

The appellants complain bitterly that their names were stricken off arbitrarily by the Committee, "and that they had no notice or knowledge of what was going on, and insist that their action ought to have no judicial sanction," and bases this opinion upon the testimony of Ellis Child-

ers and others who testify as to the conduct of the Committee in correcting the census rolls.

On pages 72 and 73 of the transcript, Louis McGilbra, a witness, testifies that he was King of Hickory Ground Town, and a member of the House of Warriors, and also a member of the Committee. "The Committee made a list of those they had scratched off and sent it to the Council. The Committee did not mean exactly to deprive these parties of their rights, but according to our instructions we had to strike them off when anyone objected to their names, and we understood that there was to be some other tribunal in which they could establish their rights to citizenship."

It is true that the testimony of some of the witnesses shows that the conduct of the Committee was not commendable, but the Council, which had a good opportunity of knowing what had been done, approved and adopted the action of the Committee by the act above quoted, fixing the basis of representation upon the census so made. The tribunal referred to by Louis McGilbra was created by Act approved May 30, 1895, page 5 of the Session Acts, in the preamble of which it is stated "That it is currently reported and believed by many that a large number of claimants who have heretofore appeared before the Committee of the National Council on Citizenship, and other authorities of the Nation, and established or ob-

tained recognition of their claim to citizenship in the Nation, accomplished the same by the undue use of money and through fraudulent means, and that in former actions involving the question of citizenship the Nation had no representative to appear as attorney and defend her interest in that behalf:

It was enacted by the Council that a committee to be styled the Citizenship Commission, to be composed of five of the most competent citizens of the Nation, whose duty it shall be to sit as a high court to try, and determine and settle all and only such questions as shall involve the right to citizenship in the Muskogee Nation that shall be presented to it, either by claimants or the duly authorized representatives of the Nation."

It is further provided therein, that the Commission organized should give public notice in all the newspapers published in the Nation, of the time and place of its meeting at least thirty days previous to such meeting; its sessions to be held in the council house at Okmulgee, the first to be on the 2d Tuesday of July, 1895. It is further provided in said Act that all persons claiming citizenship in the Muskogee Nation might appear before the said Commission, and prescribes the mode of procedure therein.

The Act made ample provision for the appellants and all other persons to establish their right to citizenship;

and it is carefully drawn so as to protect the rights of the Nation and all persons, and this court continued in existence until Sept. 30, 1896. The Council by an Act approved August 7, 1896, required that the Citizenship Commission should complete its work September 30, as above stated.

The Act of Congress of June 10, 1896, conferring jurisdiction upon the Dawes Commission to hear and determine the applications of all persons applying for citizenship limited the time for making such applications to three months after its passage, which would be until the 10th day of September, 1896.

The appellants assert that they made application to the Citizenship Commission and were unable to obtain a trial, and they subsequently applied to the Dawes Commission, which rejected their claim, and they appealed to the court below. They insist that the census rolls referred by the Council May 15, 1895, were the authenticated rolls of the Creek Nation.

This contention is unfounded, because the Council of the Creek Nation was the highest authority upon the subject of citizenship, and in the acts above cited it is declared emphatically that the rolls were incorrect, and a great number of persons were on them improperly, and that was the reason for referring them to the Committee of 18, and the rolls as corrected by them reported to the Coun-

cil and approved were the first authenticated rolls of the Creek Nation.

There were others who were admitted by the Citizenship Commission, and the Dawes Commission, and the United States court for the Northern District on appeal, who were entitled to citizenship in the Creek Nation, but the appellants belong to neither of these classes.

The counsel for the appellant says in his brief, page 31, "We deny the right or power of the Creek Council, or any committee appointed by authority of the Council, directly or indirectly, to decitizenize and disinherit any resident Creek Indian by blood." We say he is mistaken in his assumption, but if he were correct, the appellants in this case have been rejected not only by the Committee of the Creek Council, but by the Dawes Commission, and the United States Court for the Northern District of the Indian Territory. There is no ground for complaint on their part as to their treatment by the United States court. Their case was referred first to N. A. Gibson, special master, who was by order of the court directed to receive and consider all affidavits, documents and testimony which the appellants might produce, and after a careful examination he reported the case back to the court with his conclusion; and afterwards, the appellants being satisfied that the court would not admit them, asked for the case to be re-referred to R. P. de Graffenreid, who was

also a special master; he examined all the testimony which the appellants produced before him and he reported favorably to their claims to citizenship, but the court in an exhaustive opinion in which he carefully cited the laws applicable to their claim, and also the testimony, decided against them, and affirmed the judgment of the Dawes Commission.

We contend that the testimony produced is insufficient under the laws of the Creek Nation to entitle them to enrollment, and the court was satisfied from the testimony that their names upon the rolls of Broken Arrow Town were not lawfully there, and that they belong to the class of persons the Council had in view in creating the 18 Committee, which was expressly intended to correct the census rolls.

They urge that they had no notice of the action of that Committee, but they did have notice of the creation of the Citizenship Commission, and of the time and place of its sessions by notice published in all of the newspapers in the Creek Nation, and if they did not avail themselves of the opportunity thus afforded to them it was their own fault. They did go before the Dawes Commission, and there failed to show that they had been improperly stricken from the rolls by the said Committee. It is shown above that they were not on any citizenship roll of the Creek Nation on June 10, 1896, or at any subsequent

time, and we assert they never were lawfully upon any roll.

The counsel for the appellants contends that by virtue of blood alone, they were entitled to an interest in the lands which was vested in them under the treaty of 1834, and the patent issued in conformity therewith. The patent to the Creek Nation is substantially the same as the patent issued to the Cherokees.

This court, in the case of the Cherokee Trust Fund, 117 U. S. Reports, 308, in commenting upon the title, uses this language: "The lands were held for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common that he could claim a pro rata portion of the sales made of any part of them.

He had a right to use parcels of the lands thus held by the Nation, subject to such rules as the government authorities might prescribe."

In the court of claims, in the Cherokee Nation vs. Journey Cake, the following emphatic language is used:

"It is apparent that the public domain of the Cherokee Nation is analogous to the public lands of the United States, or the Demesne lands of the Crown, and that it is held absolutely by the Cherokee Government as the public property is held in trust for governmental purposes, and to promote the general welfare."

155 U. S. Report, 211.

It is clear from the above that no right to the land inheres to the individual on account of Creek or Muskogee blood alone.

The court below follows the above quoted decision and held as follows: "The government of the United States concedes to the Creek Indians, by the treaty of April 4th, 1832, the right to govern themselves so far as might be compatible with the general jurisdiction which Congress may see proper to exercise over them." By the 3d Art. of the treaty of April 12, 1834, it is provided as follows:

"The United States will grant a patent in fee simple to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States; and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby assigned to them."

The article just quoted, from the treaty of 1834, sets forth in substance the provisions of the patent to the Creek Nation given by the United States to the lands which they now hold in the Indian Territory. In commenting upon the patent to the Cherokee Nation, in the opinion heretofore rendered, this court held that the patent was to the Nation, and not to the individual Indian,

and the opinions set forth at that time in reference to the Cherokee Nation's patent will be carried out so far as the Creek patent is concerned. While these patents differ slightly in phraseology, this court is of the opinion that they are in substance the same and to the same effect.

By the treaty with the Creek Nation, proclaimed August 28, 1856, the Creeks and Seminoles were to be "secured in the unrestricted right of self-government and full jurisdiction over persons and property within their respective limits."

Certain persons were excepted from the provisions of this section and allowed to remain in the Creek and Seminole Nations, but as to all other persons, not being members of either tribe, found within their limits, it was provided:

"Shall be considered intruders and be removed from, and kept out of the same by the United States agents for said tribes respectively, assisted, if necessary, by the military."

By the twelfth article of the treaty, proclaimed August 11, 1866, the United States reaffirmed, and reassumed the obligations of the treaty stipulations with the Creek Nation entered into prior to 1861, except such as were not inconsistent with any of the articles or provisions of that treaty. From these treaty stipulations entered into between the United States and the Creek Nation, it ap-

pears that the Creek Nation was secured in the unrestricted right of self-government and full jurisdiction over persons and property within the limits of the Nation, with certain exceptions which were mentioned, and which it is not now necessary to set forth. This right of self-government was to be exercised, of course, in accordance with the treaties and laws of the United States. The right, however, of the Nation to determine who should be members of the tribe was one of the rights of self-government which Congress conceded to the Nation by solemn treaty obligations.

See pages 523 and 524, Decisions of U. S. Courts I. T. in citizenship cases 1899.

The court below, in its general opinion, announces the following:

"In determining who are citizens of the Muskogee Nation the following propositions will govern this court:

First. Those Indians who have separated themselves from the Creek Nation and have taken up their residence in the States, and have remained out of the jurisdiction of the Muskogee Nation for a period of 21 years, have forfeited all their rights and privileges as citizens of the Nation, and such persons cannot regain their citizenship unless they comply with the laws of the Creek or Muskogee Nation and be admitted to citizenship as therein provided.

Second. This court will recognize the legislation of

the Creek or Muskogee Nation in reference to citizenship therein, and also the legislation creating a commission on citizenship with prescribed powers to pass upon applications for citizenship in said Nation, as passed in accordance with the general legislative power of the Creek or Muskogee Nation; and this court will respect such legislation to the extent that it may be in accordance with the Constitution and laws of the United States and the treaties made between the United States and the Creek or Muskogee Nation.

Third. That blood alone is not the test of citizenship in the Creek or Muskogee Nation. That Creek Indians, although they may be fullbloods, who have remained out of the jurisdiction of the Muskogee Nation for 21 years will be regarded as having forfeited their right to citizenship therein; and further. that bona fide residence in the Nation is essential to citizenship.

Fourth. Full force and credit will be given to the judgments of the Citizenship Commission, and effect will be given to the acts of the Muskogee Council, unless it be made to appear that the Commission acted without jurisdiction or that the judgment was procured by fraud and that acts of the Council were in violation of the laws of the United States or the treaties made with the Nation. The acts of the Muskogee Council in the determination of applications for citizenship in the Nation will be regarded

as judgments of a court and will be subject to the same tests as to their validity."

Decision et supra pp. 525-526.

———o———

W. T. MORGAN ET AL,
Appellants,

vs.

UNITED STATES,
Appellee.

No. 454.

The foregoing argument applies with equal force to this case in respect to questions of law.

The difference between the Morgan case and the case of Jennie Johnson, is that the former was tried and determined by the Creek Citizenship Commission. A strenuous effort was made to show that the appellants were denied a fair trial, and that they were treated by the Commission with abuse and contumely. It was a signal failure. The Nation produced the testimony of four of the five judges which show that the charges were absolutely unfounded.

The Morgan case, like the other, was twice referred to special masters, and the widest latitude given for the in-

troduction of testimony upon all questions. The proof in the first place failed to show satisfactorily, that Morgan had any Creek blood in his veins.

The Citizenship Commission in passing upon this case, and commenting upon the testimony produced before them used the following language:

"The evidence failed to trace his relationship by blood to any known Creek family, either remaining in the country east of the Mississippi or emigrating to the country west. * * * " And further failed to produce any evidence to show that he had ever resided within the jurisdictional limits of the Muskogee Nation to sustain his claim to readmission. The mere fact of his having been enrolled on the census roll of the Arkansas Colored Town by the town King does not constitute a right to citizenship, nor is it considered as making application to the Muskogee Nation for citizenship. Therefore, the Commission is of the opinion and so decides that Wm. T. Morgan and his children are not entitled to citizenship in the Muskogee Nation." Tr. pages 6 and 7.

The appellant endeavored to prove that his grandfather had lived and died in the Creek Nation west of the Mississippi. The testimony offered was insufficient to establish his blood to the satisfaction of the Creek Citizenship Commission, and to the United States court for the Northern District of the Indian Territory. The testimony

shows that Wm. T. Morgan, the appellant, was born in Tennessee; and there is no testimony except his own that he was ever in the Indian Territory at all until 1863, when he was stationed at Fort Gibson as a soldier in the 14th Kansas. After that he and his father went to the state of Arkansas where he was recognized as a citizen and held the office of County Judge, and in 1888, or 1889, he went the Creek Nation and procured himself to be enrolled upon the roll of the Arkansas Colored Town, and that he was never recognized as a citizen at any of the payments, or annuities paid to the Creek Indians.

The counsel for the appellants, page 10 of his brief, says "that the testimony of the appellant, if it stood alone would be sufficient to convince any impartial person of his Creek blood."

It is unfortunate for the appellants that his testimony does not stand alone. His supporters are Gabriel Jamison, Samuel Barnet, Phillip Cæsar, Monday Hardridge and R. C. Childers, none of whom are Creek Indians by blood. All of them except R. C. Childers are admitted to be negroes, and Childers claims that he is white and Cherokee; and their testimony when analyzed will have no weight. It is somewhat strange that a man of Judge Morgan's prominence was unable to prove his Creek blood by a citizen by blood of the nation to which he alleges he and his father and grand-father belonged and

in which they had lived for several years; and it is more strange that when he returned to the nation he should have himself enrolled in a negro town, instead of in the Coweta Town to which he claims to belong.

The Cowetas are distinguished in their history as warriors, and friends to United States and furnished to the Nation some of its most eminent Chiefs, among others, Gen. William McIntosh, the friend and fellow soldier of Gen. Jackson; and Chilly McIntosh, who negotiated the treaty of 1834, above referred to, under which the Creek Indians acquired title to their present territory.

R. C. Childers, whose testimony as taken on the first day of January, 1897, said he was 74 years of age, a Cherokee Indian by blood, and a Creek Indian by adoption; and that he took the census of Coweta Town in 1840 or 1841, and that he enrolled the names of Hugh Morgan and John Morgan, and that they were Creek Indians by blood. If he tells the truth about his age, he was in 1840 only 17 years old, and at that time was not a citizen of the Creek Nation, and he was not adopted as a citizen until 1867, as is shown on page 102, Sec. 294 of McKellop's Digest. It is extremely doubtful, if not incredible, this statement that he took the census when he was so young and not even a citizen of the Creek Nation, and it is doubtful whether he was even a resident of the Creek Nation at that time.

The counsel for appellants points with pride to the endorsement of R. C. Childers by *L. C. Perryman, once Principal Chief*, who gives Robert a very good character, but the ex-Chief has no one to vouch for *his character*.

On the contrary, on page 67 of the printed record is the record of his impeachment by the House of Kings, upon charges preferred by the House of Warriors against him for his misconduct as Principal Chief, and for which he was removed from office; which under the Creek laws renders him incompetent as a witness. This, I think, is a good set of to the record of the conviction of Wiley Sukey in the United States court.

The testimony of W. T. Morgan in regard to the proceedings of the Citizenship Commission in the trial of his case is contradicted by James Colbert, the president of the Commission, Daniel Gooden, David Cummings, William Peters, Associate Judges, and Sue M. Rogers, principal clerk of the Commission, whose testimony is found on pages 52, 55, 60, 62, 63, 65, printed record. On pages 66 and 68 it is shown that W. T. Morgan, May 17, 1895, took out a license from the United States to trade with the Creek tribe of Indians, which would have been unnecessary if he at that time had been recognized or known as an Indian by blood.

As before stated the weakness of the appellants case is, that his testimony does not stand alone. The testimony

of his alleged corroberating witnesses does not corroberate.

The limited time allowed for the preparation of the brief precludes a further analysis of the testimony. The opinion of the learned Judge of the United States court for the Northern District of the Indian Territory who tried the case, reviews the testimony perfectly, and cites the laws of the Creek Nation to which reference is made. The court concludes as follows: "The examination of the testimony before the Commission, and also the opinion of the Commission clearly establishes the fact that the Commission acted within the scope of its authority, declares the fact that no error was committed." The Creek Nation confidantly believes that this court, upon the examination of the testimony, will concur in the opinion of the Judge of the court below; that the testimony adduced by the appellants fails to establish that he is a citizen of the Creek Nation by blood, and the Creek Nation insists that if he were a member of the Creek tribe of Indians by blood, it appears that he was born outside of the Indian Territory, became a citizen and held office in the state of Arkansas, and remained absent more than 21 years without making an application in good faith to be readmitted, and is therefore excluded by the provisions of the Alien Act approved Oct. 26, 1889.

The counsel for the Creek Nation filed exceptions to

the Master's report, which are omitted from the transcript of the record; and the testimony of John McIntosh which was material, is also omitted.

There are other cases which have been appealed to this court and the counsel for the Creek Nation has not been furnished with a printed copy of the record, nor the briefs of the appellants, and if this court should take jurisdiction to try the cases upon the merits, it would be just that the counsel for the Nation should be furnished with copies of the record and briefs so that he may present the Nation's side of the cases.

BEN T. DUVAL,
Attorney for the Muskogee Nation.